

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 27-CA-245644	Date Filed 7/29/2019

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT			
a. Name of Employer Whole Foods/Amazon		b. Tel. No. 303-733-6201	
		c. Cell No.	
		f. Fax. No.	
d. Address (Street, city, state, and ZIP code) 1111 S. Washington St., Denver, CO 80210		e. Employer Representative Sadie (last name unknown), store manager	
		g. e-mail	
		h. Number of workers employed 100	
i. Type of Establishment (factory, mine, wholesaler, etc.) grocery store		j. Identify principal product or service sale of groceries and merchandise	
The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.			
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) On July 22, 2019, I practiced my right to organizing and engaging with off-the-clock employees. During that process I was intimidated by the assistant manager and told to leave the premises.			
3. Full name of party filing charge (if labor organization, give full name, including local name and number) (b) (6), (b) (7)(C)			
4a. Address (Street and number, city, state, and ZIP code) (b) (6), (b) (7)(C)		4b. Tel. No. (b) (6), (b) (7)(C)	
		4c. Cell No.	
		4d. Fax No.	
		4e. e-mail	
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)			
6. DECLARATION (b) (6), (b) (7)(C) I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief. (b) (6), (b) (7)(C) (Print/type name and title or office, if any)		Tel. No. (b) (6), (b) (7)(C)	
		Office, if any, Cell No.	
		Fax No.	
Address (b) (6), (b) (7)(C)		Date 7-24-2019	
		e-mail	

**WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information may cause the NLRB to decline to invoke its processes.

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NLRB, REGION 27

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August 28, 2019

Via Electronic Filing

Ms. Angie Berens, Esq., Field Attorney
National Labor Relations Board - Region 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Re: Case No. 27-CA-245644, Whole Foods Market

Dear Ms. Berens:

This firm represents Whole Foods Market (“Whole Foods” or “Company”) in the above-captioned unfair labor practice charge (“Charge”) filed by former Whole Foods Team Member, (b) (6), (b) (7)(C) (“Charging Party”), on or about July 29, 2019.¹ Please accept this as WFM’s position statement and response to your August 19, 2019 request for evidence.²

In (b) (6), Charge, Charging Party alleges that on July 22, 2019, (b) (6) was practicing (b) (6), right to organize and engaging with off-the-clock Team Members, when a Whole Foods Assistant Team Leader intimidated (b) (6), (b) (6) and told (b) (6), (b) (6) to leave the premises. Charging Party claims that this alleged conduct violated Section 8(a)(1) of the Act. As described more fully below, the Charge is without factual or legal merit.

The Region should dismiss Charging Party’s Charge, absent withdrawal, because on July 22, Charging Party was an *off-duty* Team Member, employed at a *different* Whole Foods store,

¹ Charging Party’s sole employer at all times relevant was Whole Foods Market Rocky Mountain/Southwest L.P. Neither “Whole Foods/Amazon” nor “Amazon,” ever employed Charging Party, as incorrectly identified in the Charge.

² Whole Foods submits this statement of position to assist the National Labor Relations Board (“Board”) in its investigation and processing of the Charge and is based on the Company’s understanding of Charging Party’s contentions as stated in the Charge and the Board’s Equal Access to Justice Act letter and the facts as they are currently known to the Company. This letter does not constitute a waiver of any objections or defenses the Company has or may have to the Charge or any future complaint, subpoena, discovery or information request. Nothing herein shall be construed as a waiver of the attorney work product privilege, the attorney client privilege or any other applicable privilege with respect to the content hereof or any other matter. The Company expressly reserves the right to supplement or modify the information contained herein as it may become aware of additional facts and information.

and did not have the lawful right to be in the interior portions of Whole Food's store, which are not otherwise open to non-scheduled Team Members or the public.

I. FACTS

A. Background

Whole Foods is a multinational natural supermarket chain, which exclusively sells products free from hydrogenated fats and artificial colors, flavors, and preservatives. On (b) (6), (b) (7)(C), Whole Foods hired Charging Party as a Team Member in its Colorado Boulevard store. The Colorado Boulevard store is part of the Company's Rocky Mountain Region.

Upon commencing employment, Charging Party, like all Team Members, received Whole Foods' General Information Guide, which contains many of the Company's policies and procedures. One such long-standing policy is the Company's Safety policy, which provides that when Team Members are not scheduled to work, but are at a store as a shopper, they should not go into back rooms of the store, including storage, receiving, production, or stock areas (General Information Guide, Safety Policy, p. 40, attached as part of Exhibit 1).

The General Information Guide also contains Whole Foods' Unauthorized Visitors policy. Among other things, that policy instructs Team Members who suspect the presence of a "stranger or unauthorized visitor" in a "non-sales or non-visitor area" of their store to immediately report it to store leadership (General Information Guide, Unauthorized Visitors Policy, p. 56, attached as part of Exhibit 1). The policy also counsels Team Members to "ascertain the identity of anyone whose presence seems unusual" (*Id.*). Consistent with the Safety policy, the Unauthorized Visitors policy reminds Team Members that "customers are not allowed in non-sales areas," and that Team Members should escort individuals encountered in areas where they are not allowed back into the sales area (*Id.*). Via that policy, Whole Foods also reserves the right to ask any individual who does not appear to be making or contemplating a purchase to leave the store (*Id.*).

Policies such as Safety and Unauthorized Visitors are premised on the sound business rationale of prompting the safety of those Team Members who are and are not working. With myriad loss prevention issues, food safety concerns, and potential workplace hazards, Whole Foods has prudently decided to limit access to its back rooms to Team Members who have a business reason to be there – such as scheduled work.

Although Whole Foods limits access to its back rooms to Team Members who are scheduled to work, pursuant to the Company's Non-solicitation policy, scheduled Team Members are *not* prohibited from soliciting other Team Members for any purpose – including union organizing – during non-working-time and in non-working areas, providing that they are not violating another Company policy, such as the policy prohibiting discrimination or harassment (General Information Guide, Non-Solicitation Policy, p. 65, attached as part of Exhibit 1). In other

words, a Team Member may solicit another Team Member in any area of the store that is not devoted to selling purposes, if he/she is on an authorized meal period, break or other specified non-working period of the day when he/she is not expected to be performing his/her job duties, whether such non-work periods are paid or unpaid (*Id.*).

B. Charging Party's Violations of Whole Foods' Policies

On July 22, 2019, Charging Party entered Whole Foods' Washington Park store. Charging Party did not work at the Washington Park store, nor was [REDACTED] scheduled to work that day at that store or the Colorado Boulevard store at which [REDACTED] worked. In addition, Charging Party was not wearing [REDACTED] Whole Foods' uniform or any other paraphernalia identifying [REDACTED] as a current Team Member. Thus, in terms of the areas of the store that [REDACTED] was permitted to access, Charging Party was no different than any other customer entering the Washington Park store.

Just like any other member of the public, Charging Party entered the Washington Park store through the main customer entrance. [REDACTED] then proceeded to walk through the retail sales floor of the store, to the back of the store, where the interior rooms are located. Unlike the store's exterior and sales areas, the interior rooms at the back of the store are restricted to those who are scheduled to work. (Floor Plan, Exhibit 2). Charging Party entered the back area of the store and proceeded to the breakroom. Charging Party claims that [REDACTED] was in the breakroom soliciting the Team Members to join a labor union. Although some of the Team Members were on non-working time, several Team Members at or in the direct vicinity of the breakroom were on working time.

Per the Unauthorized Visitors policy, a Team Leader notified [REDACTED], an [REDACTED] at Washington Park, that there was a stranger in the breakroom. [REDACTED] went to the breakroom, where [REDACTED] saw Charging Party speaking with Team Members. [REDACTED] introduced [REDACTED] as store leadership, and asked Charging Party who [REDACTED] was and why [REDACTED] was in the store's breakroom. Charging Party responded that [REDACTED] was a Team Member from a different Whole Foods store, but declined to identify the store. Charging Party showed [REDACTED] his Whole Foods identification badge and asserted that [REDACTED] had the right to be in Washington Park store's breakroom talking to Team Members about topics such as wages and scheduling. Although [REDACTED] believed that the Company's policies provided that Charging Party lacked the right to be in the back rooms of the store, [REDACTED] also recognized that labor issues can be complicated. Consequently, [REDACTED] decided to leave the breakroom to confirm that [REDACTED] was legally justified in enforcing the Company's policies and asking Charging Party to leave the breakroom.

After confirming with Team Member Services (human resources) that Charging Party's presence in the Washington Park store's breakroom violated the Company's policies, and that it was irrelevant whether Charging Party was discussing the weather, terms and conditions of employment, or the prior night's baseball game, [REDACTED] returned to the breakroom with [REDACTED], another [REDACTED] at Washington Park. [REDACTED] informed Charging

Party that because Charging Party was not a Washington Park Team Member, and was not scheduled to work in the store, per Company policy, [REDACTED] needed to leave the back area of the store.

Charging Party immediately became excited and upset. [REDACTED] accused [REDACTED] of illegal conduct and violating [REDACTED] rights. [REDACTED] repeated that because Charging Party was not a Team Member at Washington Park and was not scheduled to work in the store, [REDACTED] needed to leave. [REDACTED] responded that [REDACTED] would only leave upon receipt of a written letter from Whole Foods instructing [REDACTED] to leave. Not knowing that [REDACTED] was not legally obligated to comply with Charging Party's demand, but not wishing to escalate the situation, [REDACTED] left the breakroom again to speak with Team Members Services to confirm that [REDACTED] did not need to provide Charging Party with a written letter instructing [REDACTED] to leave. When [REDACTED] returned to the breakroom a few short minutes later, Charging Party was no longer present in the back areas of the store and no one in leadership communicated any further with Charging Party that day.

II. DISCUSSION

In [REDACTED] Charge, Charging Party alleges that [REDACTED] requesting that [REDACTED] leave the interior areas of the store violated [REDACTED] rights under the Act. Charging Party's allegations are wholly without merit.

Board law is well settled that an employer may maintain a rule denying off-duty employees access to its premises where the rule: (a) is clearly disseminated to all employees; (b) limits access only to the interior of the facility; not exterior non-working areas; and (c) prohibits off-duty employee access for all purposes, not just for employees seeking to engage in union activity. *See Tri-County Medical Center*, 222 NLRB 1089 (1976) (holding that hospital's rules regarding solicitation were lawful where they permitted solicitation before and after work, on break time and meal periods, but that off duty employees should not have been prevented from soliciting outside the hospital in the parking lot and outside the front of the hospital). Whole Foods' policies follow the holding of *Tri-County Medical Center* precisely.

Whole Foods provides all Team Members, including Charging Party, a copy of its General Information Guide when they are hired. Pursuant to the Safety and Unauthorized Visitor policies, set forth in the General Information Guide, Whole Foods expressly notifies Team Members that they are prohibited from visiting interior, non-sales and non-visitor areas, of their store when they are not scheduled to work. Although Team Members are welcome to shop at any Whole Foods store when they are off-duty, like all other customers, they are simply not permitted to access the store's back rooms.

Here, it is undisputed that Charging Party was not scheduled to work on July 22, 2019, when [REDACTED] arrived at the Washington Park store. Thus, when [REDACTED] entered the store through the main entrance, walked through the retail sales area, and proceeded to enter the portions of the store restricted to only those scheduled to work, [REDACTED] was subject to the same outcome as any other off-

Ms. Angie Berens, Esq.
NLRB Region 27
August 28, 2019
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duty Team Member or customer. Given that Charging Party did not work at the Washington Park store and was not wearing any Whole Foods paraphernalia, it was no surprise that store leadership did not know who [REDACTED] was or why [REDACTED] had accessed restricted locations to sit in the store's breakroom.

Under such circumstances, it was not unlawful for [REDACTED] to ask Charging Party to identify [REDACTED] and to state [REDACTED] purpose for being in the store's breakroom. Moreover, even though Charging Party identified [REDACTED] as a Team Member from a *different* store, [REDACTED] was well within [REDACTED] legal rights to enforce the Company's off-duty access rule and ask Charging Party to leave the back of the store area. [REDACTED] decision had absolutely nothing to do with the content of Charging Party's communications and everything to do with the fact that [REDACTED] was an unauthorized stranger, present in a restricted area of the store; a place in which [REDACTED] had no business being.

To be sure, pursuant to Whole Foods' Non-Solicitation policy, Team Members may, in fact, solicit other Team Members for purposes of union organizing in non-work areas and on non-working time (e.g., a breakroom). Indeed, Whole Foods does not monitor what is said in its breakrooms and, as long the conversations do not violate policy and/or law (e.g., sexual harassment), Team Members can talk about virtually any subject. It is of note that Charging Party does not allege the [REDACTED] was told to leave [REDACTED] own store's breakroom when (or if) [REDACTED] engaged in similar conduct during a break in a scheduled shift. The fact that Charging Party claimed that [REDACTED] was discussing terms and conditions of employment (or even union organizing) at the Washington Park store was entirely irrelevant to [REDACTED] being asked to leave the breakroom. Not only was Charging Party off-duty from the Colorado Boulevard store at which [REDACTED] worked, [REDACTED] was a virtual stranger to those at the Washington Park store and was not scheduled to work there that day.

III. CONCLUSION

There is simply no evidence that Whole Foods violated the Act when it enforced its lawful off-duty access rule and asked Charging Party to leave a restricted area of the store. Accordingly, the Region should dismiss the Charge, absent withdrawal. While this statement and the information provided should be more than enough to permit the Region to dismiss quickly the Charge, should you have any questions the Company would be happy to respond to any reasonable request for further information. Please do not hesitate to contact me.

Very truly yours,

s/Jeremy M. Brown
Jeremy M. Brown

Enclosures



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Agency Website: www.nlr.gov
Telephone: (303)844-3551
Fax: (303)844-6249

October 8, 2019

(b) (6), (b) (7)(C)

Re: Whole Foods/Amazon
Case 27-CA-245644

Dear (b) (6), (b) (7)(C):

We have carefully investigated and considered your charge that Whole Foods/Amazon has violated the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have decided to dismiss your charge for the reasons discussed below.

Your charge essentially alleges that you were denied access to the inside of one of the Employer's retail stores to talk to employees who were "off the clock." The investigation disclosed that while you were off duty, you visited a store where you did not normally work to talk to employees in the breakroom. You were then asked to leave. In these circumstances, the Employer was entitled to prohibit you from accessing the break room of a facility where you, as an off-site, off-duty employee, were not scheduled to be. Accordingly, I am refusing to issue a complaint in this matter.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. To file electronically using the Agency's e-filing system, go to our website at www.nlr.gov and:

- 1) Click on E-File Documents;
- 2) Enter the NLRB Case Number; and,
- 3) Follow the detailed instructions.

Electronic filing is preferred, but you also may use the enclosed Appeal Form, which is also available at www.nlr.gov. You are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect. To file an appeal by mail or delivery service, address the appeal to the **General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

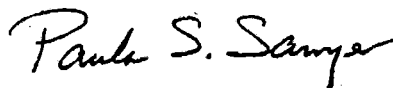
The appeal MAY NOT be filed by fax or email. The Office of Appeals will not process faxed or emailed appeals.

Appeal Due Date: The appeal is due on **October 22, 2019**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than October 21, 2019. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely.** If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before October 22, 2019**. The request may be filed electronically through the *E-File Documents* link on our website www.nlr.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after October 22, 2019, **even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,



PAULA S. SAWYER
Regional Director

Enclosure

cc: Jeremy M. Brown, Esq.
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One Gateway Center
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